any particular carrier.[6] That is the "carrier selection" process that has been followed by Ameritech and the other BOCs from the time of the MFJ's implementation, until Ameritech began this week to implement its arrangement with Qwest.

In the years following the entry of the MFJ, the long distance market became vigorously competitive. Prices declined more than 50 percent, and hundreds of new long distance carriers have successfully entered as a result of the competitive opportunities the MFJ established.

2. The 1996 Act

The Telecommunications Act of 1996 was signed into law on February 8, 1996. Its purpose is to promote competition in monopoly local and other telecommunications markets. To that end, it amends the Communications Act of 1934 ("1934 Act") to add provisions that preempt all state laws that have the effect of preventing any carrier from providing a telecommunications service, and that establish new affirmative obligations on incumbent local exchange carriers to open their markets to competition by granting competitors nondiscriminatory and cost-based access to their monopoly facilities and services in order to provide competing local services. See 47 U.S.C. §§ 251-253.

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[6] See id.; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd. 21905, 22046 (1996) ("Non-Accounting Safeguards") (describing MFJ's requirements).

The 1996 Act also supersedes the MFJ. Section 601(a)(1) provided that parties to the MFJ would henceforth be subject to the "restrictions and obligations" of the 1934 Act, as amended, instead of to those of the MFJ. See Pub. L. No. 104-104, § 601(a)(1), 110 Stat. 143 (1995). The 1996 Act further amends the 1934 Act by, inter alia, adding Sections 251(g) and 271, 47 U.S.C. §§ 251(g) and 271, to codify the core equal access requirements and the interexchange restriction of the MFJ, and to establish the mechanisms by which these duties and prohibitions may be modified or lifted.

Specifically, Section 251(g) provides that the equal access obligations of the MFJ (and other antitrust consent decrees) shall continue to apply to the parties to those decrees "until such restrictions and obligations are explicitly superseded by regulations prescribed by the [Federal Communications] Commission." The FCC has issued no such regulations.

Section 271 codifies the core of the MFJ's interexchange restriction, while simultaneously authorizing specific services that had been barred by the MFJ's terms and the judicial decisions under it. First, Section 271(a) provides that a BOC may not "provide interLATA services except as provided in this section." Second, Section 271 establishes three sets of express statutory exceptions to that general restriction. Section 271(b)(2) authorizes a BOC to provide interLATA services originating outside the states in the BOC's region, thereby overruling United States v.

Western Electric Co., 673 F. Supp. 525, 543-45 (D.D.C. 1987). Sections 271(b)(3) and (g) authorize specified "incidental" interLATA services within a BOC's region -- e.g., long distance services that are provided to cellular customers or are used to access information services or transport network signaling (overruling id. at 550-52; United States v. Western Electric Co., 907 F.2d 30 (D.C. Cir. 1990); id., 969 F.2d 1231 (D.C. Cir. 1992)). Further, Section 271(f) authorizes those services for which the MFJ interexchange restriction had been waived by the Court as of the date the Act was signed into law.

Section 271 also sets forth the standards and procedures that will govern any request to remove the remaining core of the long distance restriction as it applies to any particular BOC in a particular State. Such removal is conditioned on the BOC making a showing to the FCC that it has satisfied statutory requirements in that state. In particular, Ameritech may not begin to provide general in-region interLATA services in any state unless and until the FCC finds Ameritech: (1) has implemented a 14-point "competitive checklist" of measures that assure that new entrants can effectively offer competing local services (Sections 271 (c)(2)(A) & (B)); (2) faces a facilities-based local service competitor that is offering local service to customers in that state (or finds that all potential such providers have failed to request or timely to implement interconnection with Ameritech) (Section 271(c)(1)); (3) would comport with the separate affiliate and nondiscrimination requirements of Section 272 (Section 271(b)(1) & (d)); and (4) through its long distance authority would not subvert "the public interest" (Section 271(d)(3)).

Ameritech has not received authority from the FCC under Section 271 for any of its States. Indeed, Ameritech has only sought authorization for one state, Michigan, and the FCC soundly rejected that application, finding that Ameritech had failed to develop the interfaces critical to providing nondiscriminatory access to certain network elements, had not provided other competing local exchange carriers adequate interconnection to its own monopoly network, and had not provided the nondiscriminatory access to life-saving 911 services that is required by section 271.[7] McMaster Aff. ¶ 21. In the months following denial of its Section 271 application, rather than taking the steps that are required by Section 251 and by the competitive checklist to open its markets to competition, Ameritech has instead declared that compliance with the FCC' ruling is "impossible"[8] and has complained to Congress about "litigation" and "regulatory roadblocks."[9] For

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[7] See In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-region, InterLATA Services in Michigan, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298 (Aug. 19, 1997), ¶¶ 1, 1105-279 ("Ameritech Michigan Order").

[8] Communications Daily (Oct. 29, 1997) (statement of Ameritech Chairman Richard Notebaert).

[9] Ameritech News Release, Ameritech Challenges Congress to Fully Implement the Telecommunications Act (Nov. 5, 1997) (statement of Ameritech Executive Vice President and General Counsel Kelly Welsh) (continued...)

all these reasons, Ameritech continues to retain monopoly control of the local service markets in its region, and the long distance restriction of Section 271(a) continues to apply to U S WEST. McMaster Aff., ¶ 21.

3. The Ameritech/Qwest Arrangement.

On Thursday, May 14, Ameritech unveiled a local and long distance marketing alliance -- called the "Buyer's Advantage Program" -- with Qwest, a long distance carrier. Under the CompleteAccess program, Ameritech will abandon neutrality in its descriptions of long distance carriers to local customers. Instead, it will explicitly endorse and promote Qwest's services over those of other long distance carriers and will further allow Qwest to participate in service arrangements that Ameritech denied to competing long distance carriers. Specifically, through both inbound telemarketing (when customers contact Ameritech) and outbound telemarketing (when Ameritech contacts customers), Ameritech will inform customers that they can receive Qwest long distance service in conjunction with Ameritech local service and will recommend and urge that they do so.

Qwest will compensate Ameritech at least in part on a per-customer basis. McMaster Aff., ¶ 22. Ameritech will thus earn a specific amount for each customer it persuades to subscribe to Qwest's service -- thus giving it a direct financial interest in

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[9] (...continued)
(http://www.ameritech.com/news/releases/nov_1997/05_01.html)

Qwest's success. Qwest is the only carrier that has been selected as Ameritech's CompleteAccess partner. McMaster Aff., ¶ 23.

Qwest plainly anticipates enormous advantages arising out of its alliance with Ameritech. Qwest's CEO has predicted that the Ameritech alliance could bring more than $100 to $200 million in additional revenue in 1999 alone.[10] Further, upon entering into a similar alliance with U S WEST, he predicted an extraordinarily dramatic marketplace shift within the BOC's region as a result of this alliance, stating that he expects 25-35 percent of customers to purchase such a package, and that Qwest believes the arrangements will reduce "churn" within its customer base -- that is, those customers that it obtains through the BOC will be less likely to switch to other long distance carriers.[11] See McMaster Aff. ¶ 28. These predictions about the benefits of the U S WEST alliance are fully applicable to the Ameritech/Qwest alliance. In each instance, in exchange for a per-customer fee, Qwest will receive marketing and endorsement of its long distance service from the BOC monopoly provider of local exchange service.

According to Qwest's CEO, the Ameritech arrangement will be offered to other long distance carriers, who presumably must meet the same undisclosed terms and conditions to which Qwest has agreed

[10] Dow Jones News Service (May 14, 1998) (statement of Qwest President Joseph P. Nacchio).

[11] Qwest Press Conference Transcript, p. 3 (May 7, 1998) (statement of Qwest President and CEO Joseph P. Nacchio.

See id. ¶ 23. Ameritech's purported offer to provide the same marketing for other long distance carriers is meaningless because (1) the terms and conditions are not disclosed, (2) effective inbound and outbound telemarketing could not be provided if Ameritech were marketing multiple long distance carriers, and (3) this offer was not mentioned until the day the arrangement with Qwest commenced, thereby guaranteeing that Qwest would have an enormous "first mover" advantage even if another long distance carrier could satisfy Ameritech's undisclosed terms.

On May 14, 1998, Ameritech began marketing its "CompleteAccess" program. It is urging customers to subscribe to the service, and it is expressly promoting Qwest long distance service over the long distance service of other carriers, including AT&T and MCI.

ARGUMENT

Under well-settled standards, a court determining whether to grant a motion for preliminary injunction must consider whether the plaintiff has established "(1) some likelihood of succeeding on the merits, and (2) that it has 'no adequate remedy at law' and will suffer 'irreparable harm if preliminary relief is denied.'" Abbot Labs v. Mead Johnson & Co., 971 F.2d 6, 11 (7th Cir. 1992) (quoting Lawson Prods., Inc. v. Avnet, Inc., 782 F.2d 1429, 1433 (7th Cir. 1986)). If the plaintiff makes these threshold showings, then the court must consider: "(3) the irreparable harm the non-moving party will suffer if preliminary relief is denied; and (4) the public interest, meaning the consequences of granting or denying the injunction to non-parties." Id. In ultimately determining these four factors support an injunction, the court uses a "sliding scale" approach. Id.; Diginet, Inc. v. Western Union ATS, Inc., 958 F.2d 1388, 1393 (7th Cir. 1992). "Thus, the more likely the moving party will succeed on the merits, the less the element of irreparable harm must weigh in its favor" and vice-versa. Vencor, Inc. v. Webb, 33 F.3d 840, 845 (7th Cir. 1994). See also Roth v. Lutheran General Hosp., 57 F.3d. 1446, 1453 (7th Cir. 1995) (in applying the "sliding scale" "the district court has to arrive at a decision based on a subjective evaluation of the import of the various factors and a personal intuitive sense about the nature of the case"). In this case, each factor strongly supports the issuance of a preliminary injunction.

I. THERE IS AN OVERWHELMING LIKELIHOOD THAT THE AMERITECH/QWEST ARRANGEMENT WILL BE DECLARED UNLAWFUL.

Under the Ameritech/Qwest alliance, Ameritech is being paid to endorse Qwest's long distance service, to urge new or existing monopoly local customers to use or switch to Qwest from competing long distance services, and to offer Qwest's long distance service as part of a package with Ameritech's monopoly service. This arrangement would have constituted a blatant violation of both the interexchange restriction and the equal access requirements of the MFJ, and violates the provisions of the Communications Act --

Sections 271(a) and 251(g) -- that codify those core MFJ provisions.

A. **Ameritech Is "Provid[ing] InterLATA Services" In Violation of Section 271(a).**

As noted above, Section 271 of the 1996 Act codifies the MFJ's prohibition on the provision by BOCs of interLATA services (§271(a)), while simultaneously establishing express exceptions for out-of-region and specified "incidental" long distance services that the MFJ court and the D.C. Circuit had held were prohibited by the MFJ (§§ 271(b)(1) & (2)). Under the MFJ, the arrangement between Ameritech and Qwest would have constituted the unlawful provision of interLATA services on two separate grounds that do not fall within any of Section 271's exceptions to the MFJ's ban.

First, the MFJ court squarely held that any arrangement in which a BOC marketed the service of select interexchange carriers in competition with other interexchange carriers violated the MFJ's restriction against "provid[ing]" interexchange services. See United States v. Western Elec. Co., 552 F. Supp. 131, 227 (D.D.C. 1982) (Section II(D)(1)). The Court so held in United States v. Western Elec. Co., 627 F. Supp. 1090, 1101-03 (D.D.C. 1990)("Shared Tenant Services"); United States v. Western Elec. Co., 675 F. Supp. 655, 666 & n.46 (D.D.C. 1987); United States v. AT&T, C.A. No. 82-0192, at 3 (D.D.C. filed Apr. 11, 1985) (unpublished order).

In 1987, for instance, the Court expressly discussed its understanding of the importance of the terms "providing" and "provisioning" in its MFJ decree and explained its efforts to use the terms consistently. Western Elec. Co., 675 F. Supp. at 666. The Court examined the different contexts in which the terms are used in the decree, including Section II(D)(1)'s directive that "'no BOC shall . . . provide interexchange telecommunications services or information services,'" and the Court expressly held that "the term 'provide' or 'provision' was to be synonymous with furnishing, marketing, or selling." Id. at 666 & n.46 (emphasis added). Thus, under this definition, the marketing of a service in exchange for a fee would constitute providing that service even if the BOC did not physically transmit it.

This was also one of the several independent grounds on which the Court had previously held that it would violate the MFJ's interexchange restriction for a BOC to recommend to customers a particular long distance carrier as offering the lowest cost service. In Shared Tenant Services, supra, Ameritech had proposed to offer a service to apartment buildings and other large facilities under which it would route calls to the long distance carrier that it had identified as the lowest cost provider. Id. at 1101 ("The [BOCs] expect to perform these functions by making selections of interexchange capacity on what they deem the lowest-cost basis and by marketing the services thus assembled"). The Court found that this endorsement and routing of calls, even apart from Ameritech's purchase and resale of long distance service, violated the MFJ. It held that the "selection of carriers . . .

constitute[s an] integral part[] of the interexchange business, and that, by performing these functions, the Regional Companies would be directly competing with the interexchange carriers for that business." Id. at 1102; see also id. at 1101 ("marketing" of other carriers' long-distance services would mean that the BOC would "be directly competing with the legitimate interexchange providers").

Similarly, in United States v. AT&T, supra, the Court was asked to determine whether one of the BOCs had violated the non-discrimination provisions of the MFJ when the BOC endorsed the services of an interexchange service reseller to which the BOC had sold some switching equipment. Civil Action No. 82-0192, at 1-2. The Court ruled that the BOC's "endorsement of quality" plainly violated the decree. Id. at 3. In fact, as the Court noted, the violation was so clear that no BOC participating in the proceedings even attempted to defend the endorsement. Id. at 3 n.4.

Second, the MFJ barred any arrangement in which a BOC had a financial stake in the success of an individual long distance carrier, for the whole point of the ban on a BOC's provision of interexchange services was to assure the BOCs had no "incentive" to favor a particular interexchange carrier and to disadvantage its rivals. See United States v. Western Elec. Co., 552 F. Supp. 131, 160-65 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983). An arrangement in which a BOC markets one carrier's long distance service in exchange for a payment for each customer that the BOC signs up epitomizes the relationships that create this illicit incentive and that thus constitutes the unlawful "provi[sion]" of long distance services. Indeed, in the Shared Tenant Services case the MFJ court struck down the "marketing [of] a telecommunication package that included interexchange services" in part because the BOC "would have a direct financial interest in ensuring that a particular mix of carriers -- those offered . . . in conjunction with the [BOC] -- was selected." 627 F. Supp. at 1100 n.39.

Ameritech has not denied -- nor could it -- that its arrangement with Qwest would have been unlawful under the MFJ, that it would have constituted the forbidden "provi[sion] of interexchange services," or that it would create the precise incentive to discriminate in favor of one long distance carrier that the MFJ was designed to eliminate. Ameritech appears to contend, however, that the 1996 Act silently modified this aspect of the MFJ's interLATA restriction when it codified that restriction in Section 271(a). It could not be clearer that Section 271(a), which prohibits any BOC from "provid[ing] interLATA services except as provided in this section" (47 U.S.C. § 271(a)), continues all of the interLATA prohibitions of the MFJ except where the Act itself (or a subsequent FCC order under § 271) permits BOCs to offer interLATA services. Congress used exactly the same word -- "provide" -- that the MFJ court construed and found so central to its decree and subsequent orders. Further, while Congress enacted express exceptions for out-of-region services, incidental services, and previously authorized services -- and thereby overruled a series of earlier judicial decisions under the MFJ -- Congress created no exception for marketing. When "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." Lorillard v. Pons, 434 U.S. 575, 581 (1978). Moreover, "[t]hat presumption is particularly appropriate" where, as here, Congress has "exhibited both a detailed knowledge of the [MFJ's] provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation." Id. Further, the legislative history confirms that Section 271 would prohibit all of the activities prohibited by the MFJ, unless the statute permitted them.[12]

That Section 271(a) did not sub silentio repeal the MFJ's interLATA restriction is further confirmed by Section 274, which addresses, "electronic publishing" services. With respect to electronic publishing, Congress expressly authorized such joint

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[12] Thus, the Conference Report describes the effect of Section 271 as follows:

> New section 271(b)(1) requires a BOC to obtain Commission authorization prior to offering interLATA services within its region unless those services are previously authorized, as defined in new section 271(f), or 'incidental" to the provision of another service, as defined in new section 271(g).

H. Conf. Rep. 104-458, at 147 (emphasis added).

marketing by the BOCs with non-affiliates in Section 274(c)(2)(A).[13] Section 274(c)(2)(A) therefore shows that where Congress wished to authorize joint marketing with unaffiliated entities, it did so explicitly.

B. Ameritech Is Violating The Equal Access Requirements Of Section 251(g).

The Ameritech/Qwest arrangement independently violates Section 251(g). Section 251(g) codifies the "equal access" requirements of pre-existing consent decrees, including the MFJ, "until such restrictions and obligations are explicitly superseded by regulations prescribed by the [FCC]." 47 U.S.C. § 251(g). The FCC has not yet adopted or even proposed any such regulations, and therefore, as the FCC has noted, "any equal access requirements pertaining to 'teaming' activities that were imposed by the MFJ remain in effect until the BOC receives section 271 authorization." Non-Accounting Safeguards, 11 FCC Rcd. at 22047.

[13] Section 274(c)(2)(A) provides:

> (2) Permissible joint activities
>
> (A) Joint telemarketing -- A Bell operating company may provide inbound telemarketing or referral services related to the provision of electronic publishing for a separated affiliate, electronic publishing joint venture, affiliate, or unaffiliated electronic publisher: Provided that if such services are provided to a separated affiliate, electronic publishing joint venture, or affiliate, such services shall be made available to all electronic publishers on request, on nondiscriminatory terms.

47 U.S.C. § 274(c)(2)(A)(emphasis added).

The core theory of the MFJ depended upon removing the incentives for the BOCs to prefer the services of particular long distance carriers. The MFJ's equal access provisions reinforced this by strictly requiring, among other things, that statements BOCs made to local customers about long distance service ensured equal treatment among long distance carriers. See, e.g., United States v. Western Elec. Co., 578 F. Supp. 668, 676-77 (D.D.C. 1983). The FCC has reiterated that those requirements mandated then, and mandate now, "nondiscriminatory treatment" of long distance carriers. Non-Accounting Safeguards, 11 FCC Rcd. at 22046. They specifically require, for example, that BOC sales representatives receiving calls from customers to sign up for service provide those customers with the names "of all of the carriers offering interexchange services in [the BOC's] service area" in "random order." Id.

The MFJ Court repeatedly held that any arrangement in which a BOC marketed the services of long distance carriers violated these requirements. For example, the Court held that the issuance or marketing of calling cards that automatically routed interexchange calls to AT&T violated the equal access requirements of the MFJ. It explained that "[a]ny Regional Company advertising at this juncture will have the direct foreseeable effect of promoting AT&T services over those of the other interexchange carriers. This violates the nondiscrimination provisions of the decree." United States v. Western Elec. Co., 698 F. Supp. 348, 356 (D.D.C. 1988).

The arrangement between Ameritech and Qwest constitutes classic discrimination and "unequal access," and that is precisely why Qwest is willing to pay substantially for it. Qwest has not joined with Ameritech because Ameritech's sales representatives have any special marketing talents -- when you work for a monopoly, there is very little occasion to develop such expertise. Instead, Qwest is paying for preferential access to Ameritech's monopoly assets: (1) the ability to bundle its long distance service with Ameritech's monopoly local service and thus be the only long distance carrier to offer one-stop shopping; (2) the distribution channels and customer information Ameritech controls as a result of the fact that all residents and businesses in its area must contact it for local service; and (3) the corporate endorsement of the monopoly local provider. Qwest also has created a situation in which Ameritech will have an incentive to provide it with preferential exchange access services, and to degrade the services provided to rival carriers, in order to promote Qwest's position in the marketplace -- and in which those rivals will have to expend substantially more resources monitoring Ameritech to determine whether and to what extent such preferences are being granted.

Although Ameritech has not contested that the equal access requirements of Section 251(g) apply to such marketing arrangements, statements at the press conference announcing the deal indicate that Ameritech will assert that CompleteAccess meets the exacting standards imposed by Section 251(g) because the arrangement is open to any other long distance carrier that wishes to participate. This defense is a transparent sham for three reasons.

First, the very nature of the benefit conferred by the alliance -- preferred marketing status -- is inconsistent with broad-based participation by all interexchange carriers. Ameritech cannot recommend to its customers multiple participating carriers simultaneously. Thus, Qwest's CEO, when asked how such multi-carrier participation could possibly work with respect to the nearly identical plan entered into with U S WEST, understandably stated, "[t]o be perfectly honest with you, Alvin, I don't know how they'll do it." See Qwest Press Conference Transcript, p. 9.

Second, even if multiple-carrier participation were not self-contradictory, Ameritech has structured the arrangement so that only one carrier will enjoy its benefits for at least a considerable period of time, and that carrier will thereby obtain a critical "first mover" advantage. Qwest's CEO thus stated in connection with the identical first mover advantage that Qwest obtained from U S WEST: "time to market is very important here . . . since [Qwest's service] is the only offer that [the BOC] ha[s], this is the one they will be marketing. If you have your distribution channels filled just on an offer, you know, first mover advantage in something this compelling is very compelling." See Qwest Press Conference Transcript, p. 9. Indeed, Ameritech and Qwest announced the program on the same day that Ameritech launched its massive marketing campaign on behalf of Qwest, thereby leaving any other interested carriers with no chance of being treated equally with Qwest. And neither Ameritech nor Qwest have seen fit to publicly disclose the exact terms of their secret negotiations.

Furthermore, the enormous value of that "first mover advantage" is assuredly reflected in the compensation that Qwest was willing to agree to pay Ameritech. Subsequent carriers that seek to join, by contrast, would be forced to pay the same price for only a fraction of the value, and none will therefore do so. That is another reason why Qwest has no reason to be concerned: any paper offer by Ameritech to replicate the Qwest arrangement with others could not rationally be accepted by any competing long distance carrier. See McMaster Aff., ¶ 24.

Third and most fundamentally, even if there were some way to enable other carriers to obtain the same benefits as Qwest (which there is not), that could not cure the equal access violation. Equal access means equal treatment -- not an equal right to pay for favored treatment. A BOC may not use its monopoly power to extort payment from captive long distance carriers in return for special privileges. Ameritech has created a situation in which some carriers, if they are willing to pay for it, are "more equal than others."[14] Indeed, the reductio ad absurdum of U S WEST's "multi-tiered" approach to equal access would be if all long distance

[14] See G. Orwell, Animal Farm 123 (Penguin Books 1972).

carriers felt compelled to participate in order to avoid being competitively disadvantaged, and therefore all paid Ameritech for the mere privilege of being treated equally -- which Section 251(g) guarantees as a matter of right.

II. AMERITECH'S JOINT MARKETING ARRANGEMENT WILL CAUSE IRREPARABLE INJURY TO AT&T, OTHER CARRIERS, AND THE PUBLIC INTEREST.

Unless a temporary restraining order and a preliminary injunction is issued against Ameritech's "CompleteAccess" program it will irreparably harm AT&T, other long distance carriers, and also other firms that are seeking to take advantage of Sections 251-53 of the Act and compete with Ameritech's local monopoly service. In particular, these harms cannot be quantified and will be irreparable for the same reasons that first the MFJ and now Section 271 have prohibited Ameritech and other BOCs from providing long distance services while they have local telephone monopolies.[15] Indeed, Ameritech's conduct will irreparably harm competing carriers, and the public interest codified in Section 271, in several independent respects. The resulting increases in AT&T's and other carrier's costs, too, cannot be readily compensated by damages. Lastly, the Qwest/Ameritech arrangement will irreparably harm actual or prospective competition

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[15] It is well-established that where a plaintiff will "suffer[] substantial injury that is not accurately measurable or adequately compensable by money damages, irreparable harm is a natural sequel." Ross-Simons of Warwick v. Baccarat, Inc., 102 F.3d 12, 19 (1st Cir. 1996) (collecting cases).

for local telephone services by removing the incentive the Act provides to Ameritech to open its monopoly local exchange market to competition.

A. Ameritech's Endorsement And Marketing Of Qwest's Service In A Package With Ameritech's Local Monopoly Services Will Cause Competing Carriers To Lose Customers That Will Not Be Re-obtained After The Program Ends And Will Cause Harm To Competing Carriers' Goodwill That Cannot Be Adequately Compensated In Money Damages.

First, the Qwest/Ameritech marketing alliance will confer substantial and artificial competitive advantages on Qwest that will cause large groups of customers to leave AT&T (and other carriers) and use Qwest for reasons that have nothing to do with the price or quality of Qwest's service. In addition to revenues that AT&T will lose in the period before this court can make a final determination of the lawfulness of Ameritech's conduct, that conduct will harm AT&T's goodwill, reputation, and relationship with actual and prospective customers in ways that cannot be readily compensated by damages. McMaster Aff. ¶¶ 25-40.

Courts have held that when unlawful marketing activities by a competitor will cause lost advertising efforts, defections of customers, and harm to a firm's goodwill with actual and prospective customers, the injuries cannot be readily quantified and are thus irreparable and sufficient to support grant of a preliminary injunction.[16]

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[16] See Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc., 944 F.2d 597, 602 (9th Cir. 1991); see Gateway (continued...)

If Ameritech's conduct is not enjoined now, its arrangements with Qwest will cause AT&T and other long distance carriers to lose not only existing customers, but also prospective customers that they would otherwise obtain during the period before there is a final determination of the lawfulness of Ameritech's conduct.

Qwest's own public statements illustrate the tremendous magnitude of the potential losses. In particular, although Qwest has not garnered any significant share of the market through its own independent efforts, in discussing its similar alliance with U S WEST, Qwest's CEO has stated publicly that it could acquire 25-35 percent of the customers in the BOC's service territory because its alliance with the BOC.[17] Further, in discussing the Ameritech alliance, Qwest's CEO stated that he expects the arrangement will increase Qwest's revenue by more than $100-200 million in a single year.[18] These predictions, moreover, are consistent with experience in similar circumstances in which only one firm offered long distance service in a package with the local service of the

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16 (...continued)
Eastern Ry Co. v. Terminal R.R. Ass'n, 35 F.3d 1134, 1140 (7th Cir. 1994) ("showing injury to goodwill can constitute irreparable harm that is not compensable by an award of money damages"); Basicomputer Corp. v. Scott, 973 F.2d 507, 512 (6th Cir. 1992) (finding of irreparable injury proper where "competitive injuries and loss of goodwill are difficult to quantify"). Here, there are multiple respects in which the benefits U S WEST confers on Qwest will injure competing carriers in ways that cannot be remedied adequately in a damages award.

17 Qwest Press Conference Transcript, pp. 2-3.

18 Dow Jones News Service (May 14, 1998) (statement of Qwest President Joseph P. Nacchio).

incumbent monopolist. McMaster Aff. ¶ 27. And, in addition to revenues lost while this case is pending, once a long distance carrier loses a customer it would otherwise retain or obtain, there is no subsequent marketing effort, alliance, or court order that can guarantee return of that customer after the Ameritech/Qwest alliance is declared unlawful. Id. ¶ 29. AT&T and other carriers irretrievably lose not only the future revenue that all these customers would have generated, but also all of the goodwill and brand loyalty associated with the customer. It thus "follow[s] inexorably that neither the adverse impact on sales nor the concomitant insult to goodwill could be measured accurately." Ross-Simons of Warwick v. Baccarat, Inc., 102 F.3d 12, 20 (1st Cir. 1996).

Second, the Ameritech/Qwest alliance provides Qwest with a cost advantage over other long distance carriers that again derives solely from its relationship with Ameritech. The benefits of Ameritech's monopoly customer base, customer lists, and unique role as monopoly provider of local service will reduce its customer acquisition costs. Indeed, Qwest's CEO has predicted that the U S WEST marketing alliance will "cut our customer acquisition costs by 50% . . . and give us access to 14 million customers in the U S WEST territory." "U S WEST Strikes Marketing Alliance With Qwest in Bold Move Skirting Rules," Wall Street Journal, supra, p. A2. Qwest anticipates "a proportionate response" from its alliance with Ameritech. No after-the-fact damages award can reliably determine the amount of business that individual competing carriers lose because of Ameritech's wholly artificial reduction in Qwest's costs.

Third, the harms to AT&T and other carriers affect their relationship with prospective customers as well as their existing ones, for the advantages that Qwest anticipates are not limited to attracting new customers. Because it alone will be offering a package that is tied to local monopoly services and that no other long distance carrier can offer, Qwest has predicted that its U S West marketing alliance will cut its "customer churn by 75%." Id. Again, there is every reason to anticipate that this prediction would apply with full force to the Ameritech alliance. In an industry where over 56 million customers change long distance carriers annually, such a dramatic reduction in churn constitutes a major competitive advantage. McMaster Aff. ¶ 28. It further means that it will be far more difficult and costly for AT&T and other competing long distance carriers to attract the business of those prospective future long distance customers who have subscribed to the Qwest/Ameritech package of local and long distance service. Id.

Fourth, AT&T's and other carriers' relationships with existing and prospective customers will be harmed even in the case of those customers who do not immediately switch to the Ameritech/Qwest package. The mere fact that Ameritech will endorse Qwest in advertisements and in outbound and inbound telemarketing calls to customers who today receive service from AT&T or other carriers, or may in the future receive service from these companies, would relatively damage AT&T's and other carriers' reputations and goodwill in ways that will impair their ability to obtain and retain customers even after the Qwest/Ameritech relationship hereafter ends. McMaster Aff. ¶¶ 30-35. As noted, these injuries to the reputation and goodwill of AT&T and other competitors epitomize the kinds of harm for which an injunction is the only effective remedy. Indeed, it was the inadequacy of after-the-fact damages remedies that was the reason for the prohibitions on the BOCs' endorsement and marketing of individual long distance carriers' services in the MFJ and now in Section 271 of the Communications Act. Id. ¶¶ 12-18.

Finally, Qwest has secured a competitive advantage that no carrier -- even one willing to participate in Ameritech's violation of the Communications Act -- can now attain at any price: the first mover advantage. Id. ¶ 24. In emphasizing the benefits of its similar alliance with U S WEST, Qwest's CEO stressed this point, stating, "[T]ime to market is extraordinarily important here. Also, since this is the only offer that [U S WEST] ha[s], this is the [only] one they will be marketing. . . . [F]irst mover advantage . . . is very compelling."[19]

[19] Qwest Press Conference Transcript, p. 9.

The harm caused by Qwest's ability to be the first carrier to be promoted by Ameritech is alone sufficient to establish irreparable injury. In Mova Pharm. Corp. v. Shalala, __ F.3d __, 1998 WL 168710 (D.C. Cir. 1998), the Court affirmed a preliminary injunction based in part on the irreparable harm that would be caused to a drug company if the FDA were permitted to authorize its competitor to market a new drug first. It found the irreparable injury requirement to be satisfied because "the earliest generic drug manufacturer in a specific market has a distinct advantage over later entrants," and because the plaintiff "would find it extremely difficult to compete against the much larger [competitor] if [the competitor] got its product to market first." Id., at *5. In this case, there is no question that Qwest will gain a "distinct advantage" from its unique position as the first long distance carrier to be able to offer "one-stop shopping" with Ameritech. Further, because Ameritech is a monopoly provider of local service and has unparalleled access to the telecommunications customers in its territory, AT&T and other carriers who do not have a first-mover advantage will "find it extremely difficult to compete" against the joint Ameritech/Qwest offering.

B. The Ameritech Marketing Alliance Will Require AT&T And Other Long Distance Carriers To Incur Costs Of Monitoring Ameritech's Conduct And Will Cause Harms Resulting From Subtle Discrimination For Which Courts And Congress Have Determined There Is No Adequate Damages Remedy.